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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re J.D., a Person Coming Under the
Juvenile Court Law.

B213356
(Los Angeles County
Super. Ct. No. CK70611)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

L.D.,

Defendant and Appellant.

APPEAL from a judgment of the Superior Court of Los Angeles County.
Sherri Sobel, Juvenile Court Referee. Affirmed.

Jack A. Love, under appointment by the Court of Appeal, for Defendant and
Appellant.

James M. Owens, Assistant County Counsel, and William D. Thetford, Deputy
County Counsel, for Plaintiff and Respondent.

Appeal is taken from a juvenile court order terminating parental rights. Appellant challenges (1) the court's appointment of a guardian ad litem; (2) the absence of the guardian ad litem from the permanent plan hearing; and (3) the court's refusal to apply an exception to the rule requiring termination of parental rights. We affirm.

FACTS

Appellant L.D. (Mother) is the mother of J.D., born in October 2007. The identity of J.D.'s father is unknown. Mother has an older son, I.C., who has been in the care of his maternal grandmother (MGM) since 2001. MGM took steps to become I.C.'s legal guardian through the Family Law court, and he is not a subject of this dependency proceeding.

Shortly after J.D.'s birth, the Department of Children and Family Services (DCFS) was called by the hospital social worker, who reported that Mother's behavior "has been very bizarre" due to sudden mood swings and aggression. Mother became excessively upset for no reason—then excessively giddy—and the hospital did not feel comfortable releasing J.D. into Mother's custody. J.D. was not feeding properly, but Mother aggressively resisted the hospital's effort to keep J.D. in the neonatal unit for further observation of his food intake. Ultimately, Mother agreed to let J.D. remain hospitalized, on condition that she could visit.

Mother's family informed the DCFS social worker that Mother behaved strangely during her pregnancy, describing her as "paranoid," "aggressive," "agitated," and "schizophrenic." The social worker personally observed Mother's aggressive behavior with hospital staff members. The nursing staff felt "that it's unsafe to release the baby to mother." DCFS decided to detain J.D. "due to Mother's mental incapacity to take care of her child, which would endanger his health and well being."

On November 5, 2007, a petition was filed alleging that Mother has mental and emotional problems that prevent her from taking regular care of J.D. and endanger his health and safety. Mother denied the allegations in the petition. The juvenile court found a prima facie case for detaining J.D., and ordered family reunification services. DCFS

hoped to place J.D. with MGM, if a waiver could be obtained for MGM's 1995 misdemeanor conviction for petty theft. In the interim, J.D. was placed in a nonrelative foster home.

Mother was interviewed for DCFS's jurisdiction/disposition report. She listed numerous physical health concerns, but denied any mental health problems. Mother attributed her anger with hospital staff members to their incompetence at providing medical treatment. Mother was unaware of her pregnancy for the first five months, and does not know the identity of J.D.'s father. In an interview, the hospital social worker opined that Mother probably had a mental illness or personality disorder: Mother seemed confused, paranoid, lacked impulse control and insight, had moments of incoherence, and was easily angered. MGM informed DCFS that she is unsure whether Mother has a mental illness.

An amended petition was filed on November 28, 2007, alleging that Mother has mental and emotional problems, and a history of drug-related activity. In an accompanying report, DCFS stated that Mother has two misdemeanor convictions for drug activity. Mother hid this information from DCFS by denying criminal and drug activity. Mother denied the allegations in the amended petition.

The jurisdictional hearing was held on December 18, 2007, after DCFS and Mother agreed on a dispositional plan. At the hearing, the court asked Mother about her understanding of the agreed-upon disposition. Mother's responses were confused.¹ In light of Mother's confusion, the court said it probably needed to appoint a guardian ad litem (GAL) for Mother because "I don't believe that she understands the consequences

¹ Mother informed the court that she "barely was shown" the agreement, although her attorney stated on the record that she read the agreement to Mother aloud. When the court offered to hand the agreement to Mother, "so you can see it," Mother replied, "As of today?" Mother did not understand what it meant if the court exercised jurisdiction, but she knew that she had to take parenting classes, which "sounds very nice for me." The court inquired whether Mother understood that she has the right to bring in witnesses, to which Mother replied, "As of the workers? I'm sorry. I don't understand." Finally, Mother apologized and said, "I think I should wait for my mother."

of why she's here or what has to happen. I don't know what her mother's going to be able to help her with, but I don't honestly believe that she understands her rights enough without having a guardian ad litem."

Mother did not object to the court's proposal to appoint a GAL, and her attorney declined the court's offer to add any information to the record. The court then appointed a GAL, saying, "it's this court's opinion at this point Ms. [D.] is not able to sign a waiver of rights properly and is not really aware of the consequences of her actions, and I am uncomfortable both accepting the waiver and moving forward without appointing a guardian ad litem." The GAL conferred with Mother and Mother's counsel to ensure that Mother understands what she needs to do to reunify with J.D.

After being assured of Mother's comprehension, the court sustained two counts: (1) Mother has demonstrated numerous mental and emotional problems that limit her ability to regularly care for J.D.; and (2) Mother's criminal history of drug-related activities places J.D. at risk. The court removed J.D. from Mother's custody. Mother was ordered to take a parenting class, undergo a complete mental health evaluation, and have individual counseling. She was given monitored visits twice a week. The court warned Mother, "I need to let you know, Ms. [D.], you're only going to get six months to try to reunify with your baby. If you cannot do it, I could make a plan which could include adoption of your baby and termination of your parental rights." Mother indicated aloud that she understood what she is supposed to do.

A plan was made to place J.D. with MGM as soon as possible. A few days later, MGM's home was inspected and found acceptable; plus, a criminal waiver was approved for MGM. MGM agreed to all of the responsibilities entailed in caring for J.D. The court approved J.D.'s placement with MGM on January 2, 2008.

DCFS reported on Mother's progress in March 2008. Mother had not started to comply with the case plan. She was living with her father and grandfather in an apartment. Mother's living area was in a messy condition. When asked why she did not respond to the efforts of the DCFS social worker to reach her, Mother replied that she did

not open her mail often and was “too busy to call.” Mother was neither working nor attending court-ordered programs. Mother said “she sometimes felt ill,” which is why she could not look for a job or enroll in a parenting class. She prevented the social worker from speaking to her grandfather, who was home during the social worker’s visit. The social worker made an appointment to have Mother come in for bus tokens for transportation. Mother did not show up for the appointment.

MGM was supervising Mother’s weekly visits with J.D. MGM described Mother’s behavior as “odd”—Mother talks and giggles to herself and has severe mood swings, becoming angry and verbally aggressive with others. MGM believes that Mother needs psychiatric help. J.D. is thriving in MGM’s care, is healthy and smiles constantly. On March 25, 2008, the court directed DCFS to complete a home study, stating “I do not think that Mother is going to be physically or emotionally capable of caring for this child, but grandmother’s doing fine.”

In a June 2008 status report, DCFS wrote that J.D. remains in MGM’s care. MGM indicated that she would adopt J.D. if Mother was unable to have custody of the child. Mother had not complied with court orders to enroll in parenting classes, have individual counseling, and submit to a mental health evaluation. Mother did not make much effort to visit J.D.; however, MGM made sure that Mother saw the child weekly. MGM monitored the visits, and felt that Mother is appropriate in caring for J.D.

Mother refused to discuss the circumstances of the dependency proceeding with MGM or the DCFS social worker. She continued to avoid meeting with the social worker. Moreover, she was aggressive with her grandfather when he asked Mother what she is doing with her life. She made no effort to look for work or enroll in court-ordered programs. After an altercation with her father on April 1, 2008, Mother was hospitalized on an involuntary psychiatric hold. DCFS opined that Mother “continues to show signs of mental instability.” Despite Mother’s failure to begin the case plan, DCFS recommended additional reunification services. At a hearing on June 17, 2008, the court

directed DCFS to give new hearing notices to Mother, because the court had no intention of continuing reunification services.

On June 27, 2008, MGM informed DCFS that Mother had not appeared for visits since the second week in June, and had not gone home to sleep at her father's apartment. By mid-July, Mother's whereabouts were still unknown, and her parents were concerned about her well-being. MGM was willing to begin the process of adopting J.D. In light of these circumstances—Mother's failure to visit J.D., her unavailability to meet with DCFS, her unstable lifestyle, and her failure to comply with court orders—DCFS recommended that reunification services be terminated.

At a contested hearing on July 21, 2008, Mother asked for additional reunification services as "a special-needs parent." Counsel argued that Mother qualified as a special-needs case because she requires a GAL and was hospitalized in April on an involuntary psychiatric hold. Mother had not enrolled in counseling because she lacks insurance. Mother observed that she had a parenting class at the hospital when J.D. was born. DCFS responded that its social worker made every effort to meet with Mother, but Mother was either unavailable or refused to discuss the case with the social worker. J.D.'s attorney agreed that Mother's reunification services should be terminated because Mother made no effort to comply with court orders, and J.D. was likely to be adopted by MGM, who provides him with permanence and stability.

The court found no reasonable probability that J.D. can be returned to Mother's custody within one year of his detention. Mother has not made significant progress to resolve the problems that led to J.D.'s removal, and has not demonstrated the capacity to complete the case plan and provide for J.D.'s safety, protection and well-being. The court terminated reunification services and set a hearing to select a permanent plan. Mother was given twice weekly monitored visitation.

DCFS submitted a report for the selection and implementation hearing in November 2008. J.D. was developing normally and was well-adjusted in MGM's home, where his half-brother I.C. lives. MGM has maintained continual contact with J.D. since

his birth, and realizes that it is best that she adopt him. She has had custody of J.D. since he was two months old. MGM continued to monitor Mother's visits with J.D. Mother had not established regular contact with J.D., but "sporadically" came for visits on weekends, seeing J.D. 11 times in six months. Mother did not keep contact with the social worker. DCFS recommended that J.D. be adopted by MGM.

At a hearing on November 17, 2008, the court stated that J.D. "needs to be in an adoptive home," because he is less than three years old and because Mother needed a GAL (who was at the hearing). The court directed DCFS to complete an adoption home study, and to explain to MGM the difference between adoption and legal guardianship. In a supplemental report, DCFS wrote that MGM understands the responsibilities of an adoptive parent, agreeing that when J.D. "is adopted by her that he will become her own child in all respects." MGM "stated that she never doubted her decision to move forward with the adoption of her grandson."

At the permanent plan hearing on January 7, 2009, Mother objected to the proposed permanent plan of adoption. Instead, Mother proposed a legal guardianship. MGM continued to want adoption. The court found that J.D. is likely to be adopted, terminated Mother's parental rights, and referred the child for adoptive planning. Visitation was left to MGM's sole discretion. A notice of appeal was filed by the GAL on Mother's behalf on January 8, 2009, challenging the termination of Mother's parental rights.

DISCUSSION

1. Appointment of a Guardian Ad Litem

Mother challenges the juvenile court's order appointing a GAL. A parent who is mentally incompetent must appear by a guardian ad litem appointed by the court. (*In re James F.* (2008) 42 Cal.4th 901, 910.) The test for incompetency "is whether the parent has the capacity to understand the nature or consequences of the proceeding and to assist counsel in preparing the case." (*Ibid.*) Before the court appoints a guardian ad litem, it must hold an informal hearing: at that time, the court or counsel should explain to the

parent the purpose of a guardian ad litem and the grounds for believing that the parent is incompetent. If the parent consents, due process is satisfied. If a parent does not consent, there must be an opportunity afforded to persuade the court that no appointment is required. The court “should make an inquiry sufficient to satisfy itself that the parent is, or is not, competent,” and the record must contain substantial evidence of parental incompetence. (*Id.* at pp. 910-911.) If the proper procedure was not followed when appointing a GAL, we apply a harmless error analysis and determine whether the parent was prejudiced. (*Id.* at p. 915.)

The appointment in this case was made at the jurisdiction/disposition hearing on December 18, 2007. During the hearing, the juvenile court voiced its belief that Mother did not understand her rights without having a GAL, and invited Mother’s counsel to add information to the record. Counsel replied, “Currently, no, I do not have anything to add to the reports.” The court then appointed a GAL for Mother. Neither counsel nor the court explained to Mother the role or powers of a GAL; moreover, Mother did not have an opportunity to either consent to the appointment or persuade the court that a GAL was unnecessary. (See *In re James F.*, *supra*, 42 Cal.4th at p. 911.) Thus, the proper procedure was not followed.

Due process rights may be violated by the appointment of a GAL if the court makes “no inquiry whatever of Mother to ascertain whether she was competent in the sense of being able to understand the proceeding and to assist her attorney.” (*In re Jessica G.* (2001) 93 Cal.App.4th 1180, 1189; *In re Sara D.* (2001) 87 Cal.App.4th 661, 672.) The court in this instance actually did try to determine if Mother understood the proceeding and the rights she was waiving by signing the agreed disposition. Mother made strange responses to the court’s questions, finally saying, “I think I should wait for my mother” when the court asked whether Mother understood her right to present witnesses. (See fn. 1, *ante.*) It is evident from the reporter’s transcript that Mother did not comprehend what was being asked and wanted help from a third party.

Apart from Mother's confusion in the courtroom during the disposition hearing, the record contains statements from the hospital social worker, who described Mother's behavior as "very bizarre" due to sudden mood swings and aggression, and thought that Mother was confused and paranoid. The record also contains statements from Mother's immediate family, who described her as "paranoid," "aggressive," "agitated," and "schizophrenic." Finally, the DCFS social worker personally observed Mother's aggressive behavior with hospital staff members and noted it in the detention report.

The totality of the evidence in the record supports the appointment of a GAL. Indeed, "[t]he evidence in the record all points to the conclusion that [the parent] was incompetent and thus in need of a guardian ad litem." (*In re James F.*, *supra*, 42 Cal.4th at p. 916.) This case is distinguishable from *In re Jessica G.*, in which there was a total absence of evidence that the mother was incompetent or had a mental illness, and the court never made any inquiry, relying solely on the suggestion of counsel that the mother did not appear to comprehend the proceedings. (*In re Jessica G.*, *supra*, 93 Cal.App.4th at pp. 1188-1189.) Here, the court noted Mother's lack of comprehension, and many of the DCFS reports document Mother's behavior that (1) caused the court to order a complete mental health examination and (2) led to Mother's involuntary psychiatric hospitalization.

Finally, nothing in the record suggests that Mother "was unable to express [her] wishes to the court, either directly or through [her] appointed guardian, that [she] lacked actual notice of the proceedings as they unfolded, that the guardian and the attorney appointed for [her] failed to properly advocate for [her] parental interests, or that [Mother] ever expressed dissatisfaction with the guardian ad litem or asked the juvenile court to vacate her appointment." (*In re James F.*, *supra*, 42 Cal.4th at p. 917.) The GAL did not compromise or waive any of Mother's rights at the hearings. Mother diligently attended the dependency hearings; however, this was for naught, because she never began to comply with the court-ordered case plan, even though she agreed to it in writing before the GAL was appointed. Neither the GAL nor the court could force

Mother to have a mental health evaluation, participate in counseling, or attend parenting classes. Regardless of whether there was a GAL, Mother steadfastly resisted all discussion of the dependency case and its objectives with her family and with the DCFS social worker. She promised to start the case plan, but never did so. We cannot say that any error in the procedure of appointing a GAL affected the outcome of this case; therefore, reversal is not required. (*In re James F.*, *supra*, 42 Cal.4th at p. 918.)

2. Absence of the Guardian Ad Litem from the Permanent Plan Hearing

After complaining that the juvenile court violated due process by appointing a GAL, Mother next contends that the court erred by failing to ensure that the GAL attended the hearing on January 7, 2009, when Mother's parental rights were terminated. At the outset of the hearing, the court noted that the GAL is "not present right now." However, the minute order for the hearing states that the GAL "appears and represents the mother." The court previously indicated at a hearing on March 25, 2008, that the GAL should *not* announce her appearance for the record. At hearings on January 2 and July 21, 2008, the presence of the GAL was not mentioned in the reporter's transcript, yet the minute orders reflect that the GAL was present.

The courts do not follow a "mechanical rule" when there is a seeming discrepancy between the reporter's transcript and the minute order. (*People v. Smith* (1983) 33 Cal.3d 596, 599.) If the record is in conflict, the conflict will be harmonized if possible. If the conflict cannot be reconciled, whichever part of the record has more credibility will prevail, depending on the circumstances of each case. (*Ibid.*)

The inference to be drawn in this case is that the GAL arrived in the courtroom during the permanent plan hearing, which is documented in the minute order. There is not necessarily a conflict in the record, because if the GAL arrived after the hearing started, she would not have announced her appearance, as the judge did not wish her to do so. Under the circumstances, the minute order showing that the GAL appeared should be given credence, because the GAL's late arrival would not have been announced or acknowledged in the courtroom. We conclude that the minute order correctly reflects

that the GAL appeared and represented Mother at the permanent plan hearing on January 7, 2009.

Even if we were to assume that the GAL failed to appear, there was no prejudice to Mother. Mother never complied with the court-ordered case plan by undergoing a complete mental health evaluation, or by participating in counseling, or by enrolling in parenting classes. Mother did not correct any of the problems that led to dependency court jurisdiction. There is nothing that the GAL could have done—or witnesses that the GAL could have called at the hearing—that would somehow alter the trajectory of a case in which a parent refuses to comply with court orders. J.D. would have been found adoptable, with or without the GAL. The outcome of this proceeding would not have been more favorable to Mother if the GAL had participated in it.

3. Application of the Relative Caregiver Exception

Mother contends that the juvenile court should have applied the “relative caregiver exception” of Welfare and Institutions Code section 366.26 and appointed MGM as legal guardian instead of terminating Mother’s parental rights. At the section 366.26 hearing, the court must terminate parental rights unless “[t]he child is living with a relative *who is unable or unwilling to adopt the child* because of circumstances that do not include an unwillingness to accept legal or financial responsibility for the child, but who is willing and capable of providing the child with a stable and permanent environment through legal guardianship, and the removal of the child from the custody of his or her relative would be detrimental to the emotional well-being of the child.” (Welf. & Inst. Code, § 366.26, subd. (c)(1)(A), italics added.) The burden of establishing a statutory exception to termination of parental rights falls upon the parent. (*In re Daisy D.* (2006) 144 Cal.App.4th 287, 291; *In re Fernando M.* (2006) 138 Cal.App.4th 529, 534.)

Mother did not carry her burden of proving that the relative caretaker exception applies because there is no proof that MGM is unwilling or unable to adopt J.D. On the contrary, the record shows that MGM expressed her desire to adopt J.D. starting in June 2008, when it became apparent that Mother was not complying with court orders. At that

point, MGM indicated that she would adopt J.D. if Mother was unable to have custody of the child; MGM was ready to begin the process of adopting J.D. At the hearing in November 2008, when the court terminated Mother's reunification services, MGM apparently voiced some confusion about the difference between legal guardianship and adoption.² The DCFS social worker clarified the differences with MGM. DCFS wrote in a supplemental report that MGM "never doubted her decision to move forward with the adoption of her grandson."

Mother has seized upon MGM's brief confusion about the difference between guardianship and adoption to assert that MGM was unwilling to adopt J.D. Once the confusion was resolved, MGM "never doubted her decision" to adopt J.D.. Mother's contention that MGM felt pressured into adopting J.D. is pure speculation. This is not a case in which a grandmother testified before the court that she requested legal guardianship, only to be told by the social worker that she must adopt or the child would be removed from her home and adopted by someone else. (*In re Fernando M.*, *supra*, 138 Cal.App.4th at pp. 533, 536.) The appellate court found that the grandmother was "coerced into either becoming 'willing' to adopt Fernando or watching as someone else does." (*Id.* at p. 538.)

The record in the present case does not reflect that MGM was coerced into agreeing to adopt J.D. Before Mother's parental rights were terminated, minor's counsel stated, "I've spoken with the maternal grandmother and she is wishing to adopt [J.D.] I spoke with her yesterday and that was her wish as of yesterday. She's here today, and I'm sure she can state for herself her wishes to the court." The court then specifically found that "Nobody here strong-armed the grandmother. She has stated from the beginning she wishes to adopt." We find no statement in the record from MGM that she would like guardianship, not adoption. Under the circumstances, there is no basis for

² Whatever MGM said was not recorded; rather, minor's counsel informed the court that MGM was "very confused" because DCFS had not fully informed her about the duties of guardianship versus adoption.

finding that the relative caregiver exception applies, because MGM was always willing and able to adopt J.D.

DISPOSITION

The judgment (order terminating parental rights) is affirmed.

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BOREN, P.J.

We concur:

DOI TODD, J.

ASHMANN-GERST, J.